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June 5, 2006

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Via Hand Delivery

Ms. Marlene Dortch, Secretary Federal Communications Commission The Portals, TW-A325 445 12<sup>th</sup> Street SW Washington, DC 20554 JUN - 5 2006

Federal Communications Commission Office of Secretary

Re:

Petition to Deny of EarthLink, Inc. - WC Docket No. 06-74, Application for Consent To Transfer of Control Filed by AT&T Inc. and BellSouth Corporation

Dear Ms. Dortch:

Attached please find the original signature pages for the *Petition to Deny of EarthLink, Inc.*, filed today via ECFS.

Please do not hesitate to contact me directly should you have any questions.

Respectfully submitted,

Mark J. O'Connor

Counsel for EarthLink, Inc.

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#### Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

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In the Matter of	)		Federal Communications, commission Office of Secretary
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Application for Consent	)	WC Docket No. 06-74	
To Transfer of Control Filed by	)		
AT&T Inc. and BellSouth Corporation	)		
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#### PETITION TO DENY OF EARTHLINK, INC.

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# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

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Application for Consent	)	WC Docket No. 06-74
To Transfer of Control Filed by	j	
AT&T Inc. and BellSouth Corporation	)	
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#### PETITION TO DENY OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink"), one of the largest independent nationwide Internet service providers ("ISPs"), with over 5.5 million customers, hereby files this Petition to Deny in accordance with the schedule set forth in the Commission's Public Notice dated April 19, 2006. For the reasons discussed herein, the Commission may not conclude that grant of the application as filed would serve the public interest. Inasmuch as the burden is on AT&T, Inc., and BellSouth (collectively, the "Applicants") to demonstrate that the merger is in the public interest, the Commission must deny the petition, or at a minimum must impose significant conditions to remedy the public interest harms that will result from the proposed merger.

#### INTRODUCTION AND SUMMARY

The combination of two of the nation's largest incumbent local telephone companies will have a significant impact on the competitive landscape for both new and emerging voice and data services. The unprecedented creation of a coast-to-coast incumbent local exchange carrier ("LEC") will significantly harm competition, undermine innovation, and increase prices. While the merging parties claim that the merger will provide "a stronger network, enable more research and development, enhance service quality and lower costs for consumers" and will bring "clear"

In the Matter of BellSouth Corp. and AT&T Inc. Application for Consent to Transfer Control of BellSouth Corp. to AT&T Inc., WC Dkt. 06-74 (filed Mar. 31, 2006) ("AT&T/BellSouth")

and specifically identifiable public interest benefits,"<sup>2</sup> the facts show that only by imposing specific, effective and enforceable conditions upon any approval of the merger can the public interest possibly be salvaged from this transaction.

The Communications Act requires the merger applicants to demonstrate affirmative public interest benefits. This mega-merger of two of the four remaining Bell Operating Companies ("BOCs"), however, threatens to irreparably damage the prospects for achieving the competition goals of the Act.<sup>3</sup> AT&T and BellSouth are both the most likely entrants into each other's incumbent regions, with each company having extensive capabilities to provide both narrowband and broadband services. As a result of the merger, the loss of potential entry from either BOC into the other's region will strike one more serious blow to narrowband local competition and the Section 706 facilities-based broadband competition goals of the Act. Especially after the loss of competition from MCI and the former AT&T, the Commission should be extremely skeptical of claims that the public will be served by an additional concentration of market power in last-mile telecommunications networks.

The proposed merger will also drastically impair the Commission's ability to function by destroying benchmarking of incumbent LECs – a valuable regulatory tool that provides incentives for companies to improve their services to meet "best practices" as well as incentives for increased innovative offerings. By eliminating one of two similarly-situated companies, the proposed merger will eliminate these incentives to the disadvantage of consumers, competitors and regulators.

Merger Application"), Description of the Transaction, Public Interest Showing, and Related Demonstrations, p. iv ("AT&T/BellSouth Public Interest Statement").

<sup>&</sup>lt;sup>2</sup> Id.

<sup>&</sup>lt;sup>3</sup> Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. ("Act").

To the further detriment of competition, the proposed merger will enhance the incentives and ability of the post-merger AT&T to engage in exclusionary access policies against competitors through both tacit collusion and unilateral anticompetitive actions. The merger will increase AT&T's control over both ends of interstate calls, which will give the company an increased ability to skirt regulatory oversight, thus reducing the merged companies' incentives to lower access charges. In addition, both companies have a history of violating the FCC's rules, including violations of numerous merger-related conditions. As such, the Applicants' current hat-in-hand promises of a better tomorrow for consumers post-merger must be substantially discounted, if not rejected outright.

#### **DISCUSSION**

#### I. LEGAL STANDARD FOR MERGER REVIEW

In reviewing the proposed merger, the Commission must conduct a public interest analysis pursuant to sections 214(a) and 310(d) of the Communications Act to determine whether the Applicants have demonstrated that the public interest would be served by the merger. The Commission must weigh the potential public interest harms resulting from the merger against the potential public interest benefits "to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity." The burden of proof is on the Applicants to demonstrate by a preponderance of the evidence that the merger serves the public interest. Unlike the Department of Justice, the Commission does not conduct a public interest analysis to

<sup>&</sup>lt;sup>4</sup> 47 U.S.C. §§ 214(a), 310(d) (2005).

<sup>&</sup>lt;sup>5</sup> In the Matter of Intelsat, Ltd. and Zeus Holdings Limited Consolidated Application for Consent to Transfers of Control, Order and Authorization, 19 FCC Rcd. 24820, ¶ 15 (2004) ("Intelsat/Zeus Merger Order").

<sup>&</sup>lt;sup>6</sup> See In the Matter of Application of Ameritech and SBC Communications Inc. for Consent to Transfer of Control, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 48 (1999) ("SBC/Ameritech Merger Order").

determine whether the merger will *harm* competition. Instead, in order to find that a merger in is the public interest, the Commission must be "convinced that it will *enhance* competition" and provide public interest benefits.<sup>7</sup>

Specifically, the Commission has examined mergers for four overriding factors:

(1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits.<sup>8</sup>

Finally, the Commission analyzes the potential competitive effects of the merger under antitrust principles.<sup>9</sup> If the Commission is unable to find that the proposed transaction would serve the public interest for any reason, or if the record presents any substantial and material questions of fact, section 309(e) of the Act requires the Commission to designate the application for hearing.<sup>10</sup>

For the reasons discussed more fully below, the Applicants have failed to meet their burden of proof to demonstrate that the merger is in the public interest. In fact, the merger as currently proposed, without conditions designed to remedy the public interest harms resulting from the merger, would have significant detrimental effects for the American public.

<sup>&</sup>lt;sup>7</sup> In the Matter of NYNEX and Bell Atlantic For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶ 2 (1997) ("Bell Atlantic/NYNEX Merger Order") (emphasis added).

<sup>&</sup>lt;sup>8</sup> See SBC/Ameritech Merger Order at ¶ 48.

<sup>&</sup>lt;sup>9</sup> Id. at ¶ 49.

<sup>&</sup>lt;sup>10</sup> 47 U.S.C. § 309(e); See also In the Matter of Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 202 (1998).

### II. THE PROPOSED MERGER DISSERVES THE PUBLIC INTEREST BY NEGATIVELY IMPACTING BROADBAND AND NARROWBAND COMPETITION

The Commission must analyze the merger's effect on both *actual* and *potential* competition. With regard to the merger's effect on actual (*i.e.*, current) competition in broadband transmission markets, the Applicants have claimed "AT&T has only a limited number of DSL customers, and is not a significant competitor outside of its 13 state region." However, the Applicants say absolutely nothing about the proposed merger's effect on *potential* competition in the retail mass market for broadband services. That omission renders the application facially deficient and requires denial of the application as it currently stands. The omission is all the more striking because AT&T offered as one of the primary benefits of the SBC/AT&T merger that that transaction would "produce a flagship U.S. carrier that will offer the most efficient, highest quality capabilities to government, business, and residential customers

See In the Matter of Applications of Nextel Commc'ns Inc. and Sprint Corp. For Consent to Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd. 13967, ¶ 22 (2005). See also In the Matter of GTE Corp. and Bell Atlantic Corp., Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 23 (2000) ("Bell Atlantic/GTE Merger Order").

<sup>&</sup>lt;sup>12</sup> AT&T/BellSouth Public Interest Statement at p.106.

To be sure, the Applicants attempt to piggy-back on the argument that the "old" AT&T employed in the SBC/AT&T merger, namely, that AT&T had withdrawn from providing mass market services. See AT&T/BellSouth Public Interest Statement at 83-86. Whatever the merits of that argument might have been in the prior proceeding, the facts are entirely different here. Whereas the SBC/AT&T merger was the result of AT&T's inability to continue to compete with BOCs that had been freed from in-region long distance restrictions, the "new" AT&T is the largest telecommunications company in the world, and either currently competes or has plans to compete vigorously with respect to virtually every service in the modern communications marketplace. To the extent that the Applicants are suggesting that the scope of the merged company's future out-of-region activities should be judged on the basis of the historical activities of the "old" AT&T, the suggestion is entirely without merit. The current proceeding, which raises a horizontal competition issue that was largely absent from the SBC/AT&T transaction with respect to mass-market broadband services, is fundamentally different from the predecessor transaction, which raised primarily vertical competition issues with respect to those services.

nationwide."<sup>14</sup> In light of its promises to compete out-of-region upon the approval of that previous transaction, the absence of any discussion of even the possibility of such competition in the current application is more than curious; it is fatal.

EarthLink is most concerned about the market for broadband transmission services. Broadband transmission is a necessary input for broadband Internet access service, which is one of EarthLink's core offerings. Broadband Internet access service is also a critical platform for voice-over-Internet-protocol ("VoIP"), another major EarthLink product. Today, in any given geographic area in the United States, over 95% of broadband connections are provided either by an incumbent LEC or by the (usually sole) cable company serving that region. Therefore, aside from certain statistically insignificant exceptions, broadband today in the United States is, according to the Commission's own numbers, at best, a duopoly. Because the ability to access broadband transmission capability is now or soon will become the price of entry to *all* mass market communications markets (*e.g.*, voice, Internet access, video), and because that transmission capacity today operates under duopoly conditions at most, the merger of two broadband network providers in this already highly concentrated market raises serious concerns about the future of broadband competition in the United States.

Moreover, AT&T and BellSouth represent the most likely competitors in each other's regions for local narrowband services, including UNE-L based competitive services for residences and businesses. As the FCC has noted, not only do companies of this scale have

<sup>&</sup>lt;sup>14</sup> In the Matter of AT&T Corp. and SBC Commc'ns Inc. Application for Consent to Transfer Control of AT&T Corp. to SBC Commc'ns Inc., WC Dkt. 05-65 (filed Feb. 21, 2005) Description of the Transaction, Public Interest Showing and Related Demonstrations, p. iv.

<sup>&</sup>lt;sup>15</sup> See "High-Speed Services for Internet Access: Status as of June 30, 2005," at pp. 2-3 (rel. Apr. 2006) ("June 2005 High-Speed Report") (indicating that of total high-speed lines, 55.8% were cable and 39.8% were DSL, with incumbent LECs controlling 96.2% of DSL lines).

access to needed capital and related resources to enter into each other's territories, thereby promoting the local competition that was a predicate of the Telecommunications Act of 1996 ("1996 Act"), but they fuel the culture of competition, enhancing the ability of all current and future competitors to serve the public.

### A. The Application Fails to Disclose the Extent to Which AT&T Currently Competes With BellSouth in the Broadband Transmission Market

The Applicants take the position that they do not compete significantly today in the mass-market broadband transmission market. At the outset, the Applicants have a duty to provide something more than vague, conclusory statements regarding the actual level of broadband competition between AT&T and BellSouth. In May 2005, while the SBC/AT&T merger was under review by the Commission, SBC and AT&T issued a joint press release in which they hailed an agreement with Covad as an important step in expanding out-of-region competition post-merger:

Covad will extend broadband access to merged companies, to enable expansion of VoIP services out-of-region, promote vigorous competition in telecommunications industry

San Antonio, May 5, 2005 – SBC Communications Inc. (NYSE: SBC) and AT&T Corp. (NYSE: T) together have reached a services agreement under which Covad Communications Group Inc. (OTCBB: COVD) would extend broadband access to the merged companies, which would help the combined entity expand Internet protocol (IP) services, including voice-over-Internet-protocol (VoIP), out-of-region to consumers and businesses. The deal, effective upon completion of the SBC and AT&T merger, demonstrates the parties' commitment to promoting vigorous competition in the telecommunications industry among product and service providers.

"Consumers will continue to benefit from competition in the provision of telecommunications services, making them the real winners here," said Mark Keiffer, senior vice president-business marketing for SBC. "And agreements such as these will be especially important in enabling SBC, post-merger, to become a more effective out-of-region competitor. We look forward to working

<sup>&</sup>lt;sup>16</sup> See AT&T/BellSouth Public Interest Statement at p. 105.

with Covad not only in offering services to consumers and businesses outside of our territory, but in building on the excellent relationship that exists between AT&T and Covad today to work to bring additional services to the market, post-merger." 17

Given AT&T's explicit statement of intent to compete out-of-region with respect to VoIP and other broadband services, the Applicants here must provide specifics about the number of customers they actually serve out-of-region and about their out-of-region plans pre- and post-merger (with respect to SBC/AT&T and AT&T/BellSouth), including all intra- and inter-company communications on that subject. Instead of providing that information, however, the Applicants brush off the Covad deal by stating that AT&T only provides "DSL services to a limited number of out-of-region customers through a resale agreement with Covad. . . ."

Absent specific information about the actual competition that the Applicants acknowledge exists, but about which they have provided no facts, the application must be denied. 19

<sup>&</sup>lt;sup>17</sup> See "SBC, AT&T Reach Services Agreements with Covad," <u>SBC/AT&T Press Release</u> (rel. May 5, 2005), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21667&phase=check (attached as Exhibit A).

<sup>&</sup>lt;sup>18</sup> AT&T/BellSouth Public Interest Statement at p. 107.

<sup>&</sup>lt;sup>19</sup> Those facts are necessary not only to measure the current level of broadband competition that AT&T provides in BellSouth territory, but also to measure the potential for such non-facilities-based competition by others. For example, on pp. 107-108 of the *AT&T/BellSouth Public Interest Statement*, the Applicants argue that "[i]n any event, out of region, there are other actual or potential non-facilities-based DSL providers who could enter, and indeed who may well have entered, into similar arrangements with Covad or others, and there will continue to be competition from both DSL and cable broadband providers." This is a most curious statement. On the one hand, AT&T claims that its previously much-touted Covad deal is competitively insignificant in BellSouth territory. On the other hand, the Applicants offer up the possibility of similar deals as evidence of the existence of substantial competition to BellSouth and the cable companies from non-facilities-based DSL providers. Assuming that the capabilities under various potential resale deals with Covad are similar across those deals, then AT&T's competitive impact through those deals cannot be *de minimis* at the same time another, similarly situated DSL provider's competitive impact is significant.

## B. The Proposed Merger Will Eliminate a Significant Potential Mass Market Broadband Competitor in BellSouth and AT&T Territory

Even if one were to take at face value the Applicants' assertion that that they are not actual competitors in any meaningful way (a course not open to the Commission in light of the existing evidence to the contrary), the proposed merger would still result in substantial anticompetitive effects, and would not be in the public interest. This is the case because the merger threatens to remove the single most likely significant potential entrant into the broadband transmission market in BellSouth territory. Accordingly, unless the Commission is willing to accept the proposition that a broadband duopoly without the possibility of near-term, facilities-based competition is acceptable for American consumers, then it must either deny the application or impose conditions that will replace the potential competition that the merger will permanently foreclose.

The Commission has discussed the role of potential competition in at least two previous BOC-to-BOC mergers. In the *Bell Atlantic/NYNEX Merger Order*, the Commission introduced its concept of "most significant market participants," which builds upon the antitrust theory of "actual potential competition." There, the Commission explained its analysis this way:

In determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market. Some of these capabilities are basic to the operation of a local telephone company, relatively technical, and concern access to the necessary facilities, "know how," and operational infrastructure such as sales, marketing, customer service, billing and network management. Other capabilities are less tangible. They include brand name recognition in the mass market, a reputation for providing high quality, reliable service, existing customer relationships, or the financial resources to obtain these intangible assets. Another factor is whether the actual or precluded competitor had plans to enter the relevant market or was engaged in such planning. Such plans would be probative evidence of a perception of possession of capabilities and incentives necessary to affect the market.

In evaluating the relative significance of market participants, we also consider matters that would be material to the entry of all precluded competitors as a class, but not to any one entity in particular. Such factors would include whether the relevant market is expanding, prevailing prices in the relevant market, and the availability of capital both generally and in the relevant market.

The foregoing factors are similar to those factors used in cases applying the antitrust doctrine of actual potential competition to determine whether firms proposing to merge would have entered relevant markets with capabilities equivalent to those of other potential entrants. And, as in actual potential competition cases, in deciding whether a given precluded competitor has the capabilities and incentives to be a market participant, probative evidence may be documents from the precluded competitor's files showing it would likely have entered the relevant market. Documents, if they demonstrate serious consideration of entry, may create an inference of a capability to affect the market without a detailed examination of the competitor's capabilities and incentives.

Finally, in determining the most significant market participants from among the actual and precluded competitors, it is particularly relevant to identify which competitors, other than the merging parties, are likely to be as significant a competitor as the lesser of the merging parties. If one of the merging parties has the same capabilities and incentives as a large number of other competitors, then the loss of that one participant may be unlikely to remove much individual discipline from the market. But, to conclude that a merger would have little or no competitive effect on these grounds, the number of similar (i.e., most significant) market participants must be large.<sup>20</sup>

The Commission further explained in the SBC/Ameritech Merger Order that, in the context of the Act and the specialized communications industry, the Commission's merger analysis, although premised on the antitrust concept of actual potential competition, did not require strict adherence to each prong of the actual potential competition test:

As explained in the WorldCom/MCI Order, our framework for analyzing these transitional markets reflects the values of, and builds upon, but does not attempt to copy, the "actual potential competition" doctrine established in antitrust case law. Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects. As the case law indicates, one obstacle facing parties bringing an actual potential competition case

<sup>&</sup>lt;sup>20</sup> Bell Atlantic/NYNEX Merger Order at ¶¶ 62-65 (citations omitted).

is to demonstrate that the acquired firm would have entered the relevant market absent the merger. The transitional markets framework set forth in the *Bell Atlantic/NYNEX Order*, which is well-tailored to the Commission's unique role as an expert agency and its statutory obligation to promote competition and to open local markets, identifies as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter soon, effectively, and on a large scale once a more competitive environment is established. The Commission seeks to determine whether either or both of the merging parties are among a small number of these most significant market participants, in which case its absorption by the merger will, in most cases, if not offset by countervailing positive effects, harm the public interest in violation of the Communications Act.

As discussed above, the generally prevailing duopoly structure for broadband services means that, in any given geographic market, consumers may choose at most between incumbent MSO-provided cable modem service and incumbent LEC-provided DSL for broadband transmission service. Although satellite broadband service is generally available nationwide, it is considerably more expensive than either cable or DSL, has topographical limits on its availability, and it has latency characteristics that make it unsuitable for voice. Broadband-over-powerline ("BPL"), WiMax, and other emerging technologies may one day present a challenge to cable and DSL, but their very small market share (approximately 2% combined for satellite, wireless, and BPL)<sup>21</sup> indicates that they are competitively insignificant for the purposes of evaluating competitive conditions in the relatively near term (1-5 years).<sup>22</sup> With respect to

See June 2005 High-Speed Report at p. 2.

It is no answer to the fact that none of these technologies has become a serious competitor to say that they might someday present a meaningful competitive alternative to cable and DSL. Although the Commission has some leeway to use its expertise to predict outcomes that may be less than certain, that discretion must be exercised based on the application of articulable assumptions applied to demonstrable facts. In other words, it is not enough for the Commission merely to say that it believes, for example, that wireless and BPL broadband transmission will soon rival DSL and cable. If the Commission makes such predictions, it must say why it believes the predicted behavior will in fact occur. Moreover, in addition to providing a reasoned explanation of why the Commission expects certain conditions to develop in the industry, it must say when it expects those conditions to develop. The possibility of competition in five years is a much different thing than the possibility of competition in six months or two years.

#### Petition to Deny of EarthLink, Inc.

WC Docket No. 06-74

current competitors, cable and incumbent LEC-provided DSL are the beginning and the end of the market for purposes of competition analysis.

Moreover, in many communities, the FCC's data shows that AT&T and BellSouth are broadband monopolists and face not even a duopoly market.<sup>23</sup> Similarly, in Georgia and Louisiana, the State Public Utility Commissions have determined that BellSouth is dominant in the provision of broadband services.<sup>24</sup> Nor is this dominance likely to be remedied in the near future since, as the FCC has recognized, "no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market." <sup>25</sup>

As is described in the excerpts quoted above from the *Bell Atlantic/NYNEX Merger*Order and SBC/Ameritech Merger Order, the relevant analysis involves determining how many

<sup>&</sup>lt;sup>23</sup> For example, according to a California Public Utilities Commission staff study, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Dkt. 01-337, at p. 14 (Apr. 22, 2002) (footnotes omitted), and Appendix A (pie chart of DSL, cable and other in California). See also, In the Matter of Carrier Current Systems, including Broadband over Power Line Systems, Notice of Proposed Rulemaking, 19 FCC Rcd. 3335, Concurring Statement of Chairman Powell (2004) ("Despite increasing access to broadband services, significant areas of the country still lack any type of broadband access or competition among broadband service providers."). See also In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, Third Report, 17 FCC Rcd. 2844 at App C, Table 9 (2002) (showing that in many areas, BOCs' retail DSL offerings face no cable competition).

Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration, Georgia Public Service Commission, Order on Complaint, Dkt. No. 11901-U, at p. 6 (Nov. 13, 2003); In re: BellSouth's Provision of ADSL Service to Endusers over CLEC Loops, Louisiana Public Service Commission, Order R-26173, at p. 7 (Dec. 18, 2002).

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 233 (2003) ("Triennial Review Order") as modified by Errata, 18 FCC Rcd. 19020 (2003) vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

realistic, "most significant market participants" exist pre-merger, how many will exist post-merger, and how that change is likely to affect the future competitive landscape. Here, the analysis is simple. Cable already participates in both AT&T and BellSouth territories, so the question of what other significant players exist in the broadband transmission marketplace turns on which of the incumbent LECs may be likely participants in those territories. The only companies with the financial wherewithal, technical expertise, geographic proximity, and brand name recognition to compete with BellSouth for the provision of broadband transmission services in its historical region are AT&T and Verizon. By the same token, only Verizon and BellSouth have the realistic capability to compete with AT&T with respect to those services in AT&T's historical region.<sup>26</sup>

When one examines the most likely new entrants in BellSouth territory, it is readily apparent that AT&T is more likely to enter than is Verizon. All other things being equal (technical expertise, brand name recognition, access to capital, size of customer base) between AT&T and Verizon, AT&T's geographic position on the western edge of BellSouth's territory makes it the more likely of the two entrants. There are six AT&T states that border BellSouth states, and four BellSouth states that border AT&T states. This geographic adjacency was one of

Qwest does not appear to be a realistic competitor primarily because of its significant debt position. Moreover, Qwest has not unveiled fiber deployment plans that are anywhere near as aggressive as those announced by AT&T and Verizon. That lack of aggressive fiber roll-out plans indicates that Qwest probably has not reached the economies of scale that would allow it to expand its fiber plant beyond its historical geographic boundaries. In addition, at least with respect to possible competition in BellSouth territory, the geographic separation between BellSouth and Qwest makes Qwest a less realistic potential competitor to BellSouth. Finally, as demonstrated by the demise of the largest and best known of the competitive LECs, "old" AT&T and MCI, there is no realistic new entrant for mass-market broadband transmission services that is likely to emerge from the CLEC ranks any time soon. With respect to competition in the historical region of either AT&T or BellSouth, therefore, there are at most two "most significant market participants," both of which are BOCs -- AT&T and Verizon in BellSouth territory, and BellSouth and Verizon in AT&T territory.

the factors that led the Commission in the *Bell Atlantic/NYNEX Merger Order* to conclude that the merger was likely to preclude cross-border competition that would otherwise occur. <sup>27</sup> The only meaningful geographic contact between BellSouth states and Verizon states occurs on the Virginia/North Carolina border, with minimal additional contact in southern West Virginia and far southeastern Virginia. AT&T, therefore, appears to be a more likely potential entrant in BellSouth territory than does Verizon. <sup>28</sup>

There can be no doubt that AT&T has the financial and technical strength to compete for broadband service customers in BellSouth territory. Indeed, if AT&T, the largest and (according to its own self-evaluation) most technologically advanced communications company in the world, cannot go head-to-head with BellSouth, then no company can. If the Commission were to reach the conclusion that entry by AT&T into BellSouth territory is not feasible, that would amount to a conclusion by the Commission that there will not be *any* meaningful additional facilities-based competition in any broadband market in the foreseeable future, a conclusion that would sharply undercut the justification for the most recent Verizon/MCI and AT&T/SBC mergers. Assuming, then, that the Commission concludes that AT&T is capable of entering the mass-market broadband transmission market in BellSouth territory, the question becomes whether it is reasonable to believe that, absent the merger, AT&T is in fact likely to do so.

In determining whether a potential entrant is likely actually to offer service in a new market, the Commission relies both on internal documents from the potential entrant and also on

<sup>&</sup>lt;sup>27</sup> See, e.g., Bell Atlantic/NYNEX Merger Order at ¶ 78.

With respect to the mirror-image issue of the possibility of BellSouth entry into AT&T territory, a possibility that would also be foreclosed by the merger, the analysis is largely the same, with the caveats that Verizon is a larger company than BellSouth (although BellSouth has an exceptionally strong balance sheet), and Verizon does not face the same geographic barriers to entering AT&T territory that it does to entering BellSouth territory.

objective indications that such entry would be profitable.<sup>29</sup> As to the first source of evidence – company documents – there is no indication that any have been produced or, at this stage, requested. EarthLink urges the Commission to instruct AT&T and BellSouth to produce all documents such as studies, plans, proposals, feasibility studies, e-mails, economic analyses, market studies, etc., that would shed light on the Applicants' plans to compete out-of-region with respect to broadband transmission services. EarthLink attaches as Exhibit B a list of suggested questions and document requests for the Applicants.

With respect to objective indications that AT&T would enter, the Commission has previously found with respect to "greenfield" fiber deployments that the revenue opportunities associated with services that may be offered over fiber provide a sufficient incentive for companies to move into new markets. When that profit incentive is combined with the fact that AT&T already has a nationwide long-distance customer base, a cellular customer base in BellSouth territory through Cingular, and a nationwide (and international) Tier I Internet backbone network, it appears that all of the necessary pieces are in place for AT&T to enter BellSouth's territory for the purpose of offering broadband transmission and the associated services that can be transmitted over a broadband network. Indeed, the stated purposes of the SBC/AT&T combination was to allow the merged company to "assemble a true *nationwide* end-to-end broadband network" in order to "offer the most efficient, highest quality capabilities to

 $<sup>^{29}</sup>$  See SBC/Ameritech Merger Order,  $\P$  75.

<sup>&</sup>lt;sup>30</sup> See Triennial Review Order, ¶ 274. The associated findings in that section of the 2003 Triennial Review Order to the effect that competitive LECs are more likely to build significant fiber-to-the-home systems for mass-market use have, of course, been proven wrong in the intervening three years. Only the BOCs have announced plans to build such systems on a broad scale.

<sup>&</sup>lt;sup>31</sup> AT&T/SBC Public Interest Statement at p. iii (emphasis added).

government, business, and residential customers *nationwide*."<sup>32</sup> The Applicants in that previous merger went so far as to state explicitly that "the merger will *enhance* competition outside of SBC's region . . ."<sup>33</sup> Moreover, as discussed *supra* at 7-8, SBC and AT&T in May of 2005 announced a deal with Covad that had the express purpose of providing out-of-region broadband competition. The fact that the Applicants here seek to belittle the very arrangement that they announced with such vigor during review of the prior merger must give the Commission cause to investigate AT&T's out-of-region plans in greater depth, not give it cause to assume that those plans do not exist.

Summarizing the analysis, then, in BellSouth territory there are, at most, currently two major broadband service providers – BellSouth and the cable provider in each applicable geographic market. In addition, there are two potential entrants, AT&T and Verizon. Of the two, AT&T is the more likely entrant. Accordingly, post-merger, assuming for the sake of argument that AT&T is not considered an actual broadband competitor in BellSouth territory, the competitive landscape changes from one in which there are at best two actual competitors and

<sup>&</sup>lt;sup>32</sup> <u>Id</u>. at p. iv (emphasis added).

on the premise that the combination would create a company with the scope and capability to bring broadband competition to the entire nation, it is equally clear that its out-of-region plans did not depend on any further mergers. In a November 7, 2005, interview, in response to the question "Is it a possibility that SBC would acquire BellSouth?" SBC CEO Edward Whitacre answered that: "It sure would be nice, but it doesn't have much chance of happening because of market power, size, etc. I think it would be real hard to do. I don't think the regulators would let that happen, in my judgment." *Online Extra: At SBC, It's All About "Scale and Scope,*" BusinessWeek online, Nov. 7, 2005, available at <a href="http://www.businessweek.com/">http://www.businessweek.com/</a> print/magazine/content/05\_45/b3958092.htm?chan=gl (last visited May 8, 2006). However accurate Mr. Whitacre's predictions regarding the regulatory treatment of the current merger might be in the end, it is clear that the nationwide broadband competition that he envisioned as arising from the SBC/AT&T combination did not depend on any future combination with BellSouth, but instead that such competition was intended to result solely from the SBC/AT&T merger.

two potential competitors, to one in which there are at most two actual competitors (AT&T/BellSouth and cable) and one potential competitor (Verizon). Given the size (in numbers of customers, revenues, and geographic reach) of the proposed merged company and the geographic insulation that the merger would bring, the remaining potential competitor (Verizon) would likely become a substantially less viable potential competitor in BellSouth territory post-merger than it is today.

The Commission has found that BOC-to-BOC mergers that would have created less concentration than this merger were not in the public interest absent significant conditions. In the *Bell Atlantic/NYNEX Merger Order*, for example, the Commission found that the merger of two of the five most significant market participants would not be in the public interest.<sup>34</sup> Here, of course, the merger is between two of only four participants, with one of the merging parties being the stronger of two potential competitors. The net effect of the merger would be to transform the mass-market broadband transmission market in BellSouth territory from a duopoly at best with two actual potential competitors (AT&T and Verizon) one with only a single, substantially weakened actual potential competitor (Verizon). That is a situation that indicates real competitive concerns both under traditional antitrust potential competition theory<sup>35</sup> and also

<sup>&</sup>lt;sup>34</sup> Bell Atlantic/NYNEX Merger Order, ¶ 70; see also SBC/Ameritech Merger Order, ¶¶ 87, 95 (merger of two of five most significant participants not in public interest).

Under a traditional antitrust potential competition theory, all five elements of the test for when removal of a potential competitor through merger significantly threatens competition are met. See Bell Atlantic/NYNEX Merger Order at ¶ 138 and cases cited therein. First, the market in question is highly concentrated (duopoly). Second, few other potential entrants are equivalent to the proposed merging company (only Verizon comes close). Third, AT&T is reasonably likely to enter the broadband market in BellSouth territory absent the merger (indeed, it has already done so, and has stated such entry as one of the purposes of its prior merger). Fourth, AT&T has a means of entry other than through merger (direct entry through fiber build-out and entry through Covad arrangement). Fifth, AT&T's non-merger means of entry would likely result in substantial de-concentration of the broadband market in BellSouth territory (such entry would increase the number of substantial facilities-based competitors from two to three). Given that

under the Commission's related "most significant market participant" framework. Accordingly, the application for transfer of control must either be denied or the Commission must impose substantial conditions that have a realistic chance of replacing the broadband transmission competitive options that the merger will foreclose.

### C. The Proposed Merger will Undermine Local Competition Generally in AT&T and BellSouth Regions

In addition to the adverse competitive impact of the proposed merger on broadband services, the merger would also damage the competitive landscape for wireline voice competition. Not only is AT&T a current provider of such services throughout BellSouth's region, <sup>36</sup> the merger represents the loss of one of the most likely significant potential entrants providing mass market voice services to business and residential consumers in each of the Applicants' regions, including through UNEs, resale, acquisition of smaller out-of-region competitors, and VoIP. Indeed, the former SBC is a self-proclaimed "leader in IP communications" for voice, having launched a significant residential VoIP initiative in November 2004 and VoIP services for business customers in 1998, including a VoIP service spanning 110 cities across the country. <sup>37</sup> As the Commission recognized in the merger of Bell Atlantic and NYNEX, "[m]ergers between incumbent LECs will likely reduce experimentation

even this more stringent traditional antitrust standard is met, the Commission's task clearly becomes one of determining whether there is a set of conditions that can realistically be expected to replace the competition that the merger would foreclose, such that the merger could still be found to be in the public interest. Any such conditions would, at a minimum, have to provide opportunities for companies with regional or national scope to provide competing broadband transmission services at a commercially reasonable cost.

<sup>&</sup>lt;sup>36</sup> See, e.g., BellSouth Corp., Form 10-K, filed with the Securities and Exchange Commission on Mar. 31, 2006 at 15 (noting that as of Dec. 31, 2005, AT&T, along with MCI, was one of its two most significant local service competitors).

<sup>&</sup>lt;sup>37</sup> See "SBC Communications Announces Launch of Residential VoIP Service," <u>SBC Press Release</u>, (rel. Nov. 16, 2004), available at http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21461.

and diversity of viewpoints in the process of opening markets to competition"<sup>38</sup> and further noted the public interest harms that result when an incumbent LEC avoids competition by eliminating a potentially significant future competitor.<sup>39</sup>

Moreover, it is well recognized that the existence of a significant potential entrant chances generally the ability of all competitors to compete, especially where the potential entrant is a market participant of the size of AT&T or BellSouth. 40 Just as the FCC has recognized in previous BOC mergers, the FCC must employ an analysis that accounts for the emerging nature of competition that is additive to the strictures of the "actual/potential competition" limits established in antitrust case law. 41 Certainly, there is no question that AT&T (as well as BellSouth) has the capabilities to expand its service base by offering out-of-region consumers a full-service suite of services including traditional voice, data and even video. Indeed, David W. Dorman, AT&T Chairman and Chief Executive Officer proclaimed upon consummation of the SBC/AT&T merger that the new company "will have all the capabilities necessary to compete successfully in serving a broad range of customers across the country and

<sup>&</sup>lt;sup>38</sup> Bell Atlantic/NYNEX Merger Order, ¶ 152.

<sup>&</sup>lt;sup>39</sup> Id., ¶ 96

Thus, the FCC has stressed that "the loss of even one significant market participant can adversely affect the development of competition." <u>Id.</u>, ¶ 66. As just one example, the ability of one competitor to negotiate a strong interconnection agreement can redound to the benefit of all other competitors who may choose to add such favorable terms to their own agreements with the incumbent.

See Bell Atlantic/GTE Merger Order, ¶ 97 n. 244. There, the FCC stressed its "statutory obligation to promote the development, and not merely prevent the lessening, of competition in telecommunications markets," citing, SBC/Ameritech Merger Order, ¶ 63. See also SBC/Ameritech Merger Order, ¶ 64 (noting that such a framework is well-tailored to the Commission's unique role as an expert agency and its statutory obligation to promote competition and to open local markets).

around the globe."<sup>42</sup> Given the grand scope of AT&T's plans to become an effective global communications company, but for the merger, it is highly likely that it would become a significant competitor in BellSouth's region.

Indeed, the FCC should be mindful that while broadband services are unquestionably critical for the American public, it is equally important under the goals of the Act that full-fledged traditional wireline voice competition is served in this proceeding as in all of the Commission's actions. <sup>43</sup> Thus, the FCC should heed its prior decisions that stressed the possible adverse consequences of eliminating a significant potential competitor in a BOC-to-BOC merger. Noting the incumbent LECs' incentive and ability to discriminate against competitors in all retail markets, the FCC has found that "the likelihood of increased harmful discrimination is particularly acute with respect to competitive providers of local exchange services to mass market customers (smaller businesses and residential customers)." <sup>44</sup> As experience since the 1996 Act has demonstrated, the fewer the number of competitors, the less likely true competition is to take hold as incumbent LEC actions to quash competition are more likely to succeed. <sup>45</sup>

<sup>&</sup>lt;sup>42</sup> "SBC to Acquire AT&T," <u>SBC/AT&T Press Release</u>, (rel. Jan. 31, 2005), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21566.

While there has been some fulfillment of the Act's local competition goals, the fact is that competitors still account for a small share of local wireline voice services today. Thus, according to the FCC's most recent data published in June 2005, incumbent LECs have over six times the revenue of competitive LECs for local service and serve roughly 82% of local customer lines. *See* "Trends in Telephone Service," at Tables 8-1, 8.5, 8.7, and Chart 8-5 (rel. Jun. 21, 2005) available at http://www.fcc.gov/Bureaus/Common\_Carrier/Reports/FCC-State\_Link/IAD/trend605.pdf. Moreover, given the loss of the former AT&T and MCI as competitors, it is highly likely that more recent measures of incumbent local market share will increase rather than decrease.

<sup>&</sup>lt;sup>44</sup> Bell Atlantic/GTE Merger Order, ¶ 175; SBC/Ameritech Merger Order, ¶ 188.

<sup>&</sup>lt;sup>45</sup> Indeed, anticompetitive conduct can be compounded through "spillover" effects whereby the level of discrimination engaged in by the combined entity in each region within the combined

Consumers and competitors are already feeling the loss of the former AT&T as a robust competitor; approval of the merger as proposed, however, will only add to the likelihood that the goals of the 1996 Act for local voice competition will never become the reality.

III. THE PROPOSED MERGER INCREASES THE INCENTIVES AND ABILITY FOR THE MERGED COMPANY TO ENGAGE IN EXCLUSIONARY AND ANTICOMPETITIVE ACCESS PRACTICES WITH RESPECT TO COMPETITORS

Competing carriers and service providers in today's marketplace rely on AT&T and BellSouth for a range of last-mile access services including UNE-L, other unbundled elements, and broadband services, to serve American businesses and residences. As the Commission has repeatedly recognized, unbundled access to incumbent LEC UNE-L copper loops is critically important to meet the continuing goals of the 1996 Act. AT&T and BellSouth also continue to hold and exert market power in the provision of switched and special access services in their regions. But for effective regulatory oversight, either AT&T or BellSouth alone could engage in discriminatory, unreasonable and excessive access pricing from competitors, as well as other anticompetitive conduct, whereby access is delayed, denied or degraded. Indeed, the evidence gathered in ongoing proceedings shows that anticompetitive conduct, including above-cost and discriminatory pricing and other practices already exists, harming competition and American business productivity; approval of the proposed merger would enhance the ability and incentives to engage in such anticompetitive conduct, substantially disserving the public interest.

A. The Merger Will Increase Collusion Among Incumbent LECs and Impede Progress Towards Cost-Based Access and Robust Competition

As proposed, the merger would hinder the goals of the Commission and the 1996 Act to bring this country's incumbent LEC access services – UNEs, switched access, and special access

territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger. See e.g., SBC/Ameritech Merger Order,  $\P$  192; Bell Atlantic/GTE Merger Order,  $\P$  177.

- to cost-based prices and reasonable terms and conditions by enhancing the incumbent LECs' ability to quash competition in these incumbent LEC-dominated local markets. Indeed, this unprecedented incumbent LEC concentration would result in just two significant wireline incumbent carriers (AT&T and Verizon) serving the vast majority of U.S. consumers. Under these circumstances, the likelihood of tacit collusion on access pricing and practices between the post-merger AT&T and Verizon will be greatly enhanced, subverting the public interest.

The FCC has long recognized that a potential anticompetitive effect of horizontal incumbent LEC mergers such as here is the enhanced ability of the remaining market participants to engage in effective coordination of anticompetitive activities.<sup>46</sup> Indeed, the Commission has further found that the potential for anticompetitive coordination between parties post-merger is of sufficient concern to tip the balance against the necessary public interest finding in the

In markets where only a few firms account for most of the sales of a product, those firms may be able to exercise market power by either explicitly or tacitly coordinating their actions. Accordingly, one way in which a merger may create or enhance market power or facilitate its exercise is by making such coordinated interaction among firms more likely, more successful, or more complete. For example, by reducing the number of firms necessary to control a given percentage of total supply, a merger may lower the difficulties and costs of reaching and enforcing the terms of an agreement to restrict output.

See also, Bell Atlantic/GTE Merger Order, ¶¶ 142, 172.

As recently as the SBC/AT&T Merger Order (¶ 20) the Commission has recognized that because the merger Applicants "provide critical inputs, particularly special access services, to various communications markets, we need to consider the potential vertical effects of the merger -- specifically, whether the merged entity will have an increased incentive or ability to injure competitors by raising the cost of, or discriminating in the provision of, inputs sold to competitors." In the Matter of SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd. 18290 (2005) ("SBC/AT&T Merger Order") See also, In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶ 150 (2004):